AND
BRIEFS

Supreme Court, U.S.
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No. 15-1031

IN THE
Supreme Court of the United States

JOHN HOWELL,
Petitioner,

v.

SANDRA HOWELL,
Respondent.

On Petition for a Writ of Certiorari
to the Arizona Supreme Court

PETITIONER'S SUPPLEMENTAL BRIEF

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The Government's amicus brief correctly recommends a grant of certiorari, and the Court should follow the Government's recommendation. Although the Court sometimes grants certiorari when the Government files an invitation brief recommending a denial, it almost never denies certiorari when the Government recommends a grant. For instance, dating back to last Term, the Government has recommended grants of certiorari in six invitation briefs, and this Court has followed the Government's recommendation every time. *Endrew F. v. Douglas County School District RE-1*, No. 15-827; *Czyzewski v. Jevic Holding Corp.*, No. 15-649; *Fry v. Napoleon Community Schools*, No. 15-497; *Venezuela v. Helmerich & Payne International Drilling Co.*, No. 15-423 (Government recommended grant of certiorari, limited to third question presented; Court followed Government's recommendation); *Life Technologies Corp. v. Promega Corp.*, No. 14-1538 (Government recommended grant of certiorari, limited to second question presented; Court followed Government's recommendation); *Lightfoot v. Cendant Mortgage Corp.*, No. 14-1055. The same result is warranted here.

The Government errs, however, in recommending that the Court affirm the Arizona Supreme Court. The Government does not meaningfully grapple with the fact that the divorce court's order is economically identical to an order requiring Petitioner to pay half of his disability benefits to Respondent. Because the Uniformed Services Former Spouses' Protection Act ("USFSPA") prohibits state courts from treating

disability benefits as community property, and the divorce court's order effectively did just that, the divorce court's order is preempted by the USFSPA.

I. The Court Should Grant Certiorari.

The Government correctly states that "state supreme courts have expressed sufficiently divergent views" on the issue presented here that "the Court's review is warranted to clarify the USFSPA's preemptive scope." CVSG Br. 8. It notes that "State supreme courts have ... adopted a variety of responses to the question whether a disposition-of-property order issued at the time of divorce may subsequently be modified to account for the economic impact of a veteran's post-divorce waiver of military retirement pay and election of disability benefits." *Id.* at 20. Thus, "[t]his Court's review is warranted to clarify the extent to which disposition-of-property and spousal-support requirements may be modified to address the economic consequences of post-divorce waivers of military retirement pay." *Id.* at 21.

Indeed, the decision below directly conflicts with decisions of five other state supreme courts.

1. *Mallard v. Burkart*, 95 So. 3d 1264 (Miss. 2012). Mallard waived a portion of his military retirement pay after the parties' divorce, and Burkart sought to modify the decree to receive the same monthly payments she was previously getting. Pet. 18-20. The Mississippi Supreme Court held that federal law prohibited the modification. *Id.*; *see* 95 So. 3d at 1272 ("state law is preempted by federal law, and thus, state courts are precluded from ordering distribution of military

disability benefits contrary to federal law"). As the Government correctly states, "[t]he decision in *Mallard* thus squarely conflicts with the Supreme Court of Arizona's ruling in this case." CVSG Br. 14.

2. *Youngbluth v. Youngbluth*, 6 A.3d 677 (Vt. 2010). Bruce Youngbluth waived a portion of his military retirement pay after the parties' divorce, and Elisabeth Youngbluth sought to modify the decree to receive the same monthly payments she was previously getting. The Vermont Supreme Court held that the modification was preempted, in conflict with the decision below. Pet. 17-18.

The Government finds it "plausibl[e]" that the result in *Youngbluth* could have been driven by state law, but ultimately agrees that the Vermont Supreme Court "reli[ed] on federal preemption principles." CVSG Br. 15-16. Indeed, the *Youngbluth* court made repeatedly clear that it was relying on federal law as interpreted in *Mansell v. Mansell*, 490 U.S. 581 (1989). *See Youngbluth*, 6 A.3d at 683 ("Given that *Mansell* held that state courts are without power to divide disability benefits in a property division order, we agree with those courts that have held that in this type of situation the trial court's order cannot be read to have granted wife an interest in husband's disability benefits"); *id.* at 684-85 ("Rather than joining those courts that have found 'creative solutions' around *Mansell*, we recognize that, regardless of whether we agree or disagree with it, a decision by the United States Supreme Court on a matter of federal law is binding upon the state courts" (internal quotation marks omitted)); *id.* at 690 ("federal law is very clear

that the former spouse has no right to those amounts of retirement benefits which the former military servicemember waived so he could receive disability benefits" (internal quotation marks and alterations omitted)).

3. *Ex parte Billeck*, 777 So. 2d 105 (Ala. 2000). Edwin Billeck waived a portion of his military retirement pay after the parties' divorce, and Hellene Billeck sought to modify the decree to receive the same monthly payments she was previously getting. The Alabama Supreme Court held that the modification was preempted, in conflict with the decision below. Pet. 20-21.

As the Government explains, *Billeck* reasoned that *Mansell* does not "allow[] trial courts to consider veteran's disability benefits in awarding alimony." CVSG Br. 17 (quoting *Billeck*, 777 So. 2d at 108). The Government characterizes *Billeck* as "reflect[ing] a particularly expansive view of USFSPA preemption," *id.*, in conflict with the narrower view of USFSPA preemption in the decision below. The Government states that the order in *Billeck* "expressly directed the veteran to pay over his disability benefits (rather than simply to indemnify his ex-wife for the economic loss caused by his partial waiver of military retirement pay)." *Id.* But the Alabama Supreme Court made clear that such an indemnification order is preempted by federal law: "The state courts have reasoned that, as long as the trial court does not order the husband directly to pay his veteran's disability benefits to the wife, the trial court does not violate [the USFSPA]. This reasoning is flawed. ... [T]he trial court essentially

is awarding the wife a portion of those veteran's disability benefits; and in doing so the trial court is violating federal law." 777 So. 2d at 108-09.

4. *Clauson v. Clauson*, 831 P.2d 1257 (Alaska 1992). James Clauson waived a portion of his military retirement pay after the parties' divorce, and Dorothy Clauson sought to modify the decree to receive the same monthly payments she was previously getting. The Alaska Supreme Court held that the modification was preempted, in conflict with the decision below. Pet. 21-23. The Government states that the Alaska Supreme Court's reasoning "seems inconsistent with the indemnification remedy approved by the Supreme Court of Arizona in this case." CVSG Br. 18. This is clearly correct given that the Alaska Supreme Court reached the exact opposite conclusion from the court below in a case presenting identical facts. Pet. 21-23.

The Government points out that a subsequent Alaska case enforced an explicit indemnification provision in a divorce decree. CVSG Br. 18-19. But as Petitioner explained in his petition (Pet. 31-32), and as the Government acknowledges (CVSG Br. 22 n.9), the divorce decree here included no such provision. Indeed, the Arizona Supreme Court's explicit holding that it was modifying, rather than enforcing, the original terms of the decree is the precise feature of the case that makes it such a *good* vehicle. Pet. 31-32.

5. *Kramer v. Kramer*, 567 N.W.2d 100 (Neb. 1997). Kenneth Kramer waived a portion of his military retirement pay after the parties' divorce in 1994, retroactive back to 1992. The court ordered Kathleen to reimburse Kenneth for his disability pay from the

period from 1992 to 1994; for the period after 1994, the court adopted *Clauson*'s prohibition on "redistribution" in response to a post-divorce conversion to disability compensation. Pet. 23-25. As the Government states, the Nebraska Supreme Court adopted the rule that a divorce court may not "simply shift an amount of property equivalent to the waived retirement pay from the military spouse's side of the ledger to the other spouse's side." CVSG Br. at 19 (quotation marks omitted). Such a shift, however, is precisely what the Arizona Supreme Court authorized in this case.

* * *

Thus, as the Government recognizes, this case presents one side of a conflict of authority on the preemptive effect of the USFSPA. The Government identifies no vehicle problems and does not dispute that this case has several features that make it a particularly strong vehicle for this Court's review. Pet. 29-33. The petition should be granted.

II. The Decision Below Is Wrong.

The Government is wrong on the merits. The decision below is irreconcilable with *Mansell* and should be reversed.

Mansell held that the USFSPA "does not grant state courts the power to treat as property divisible upon divorce military retirement pay that has been waived to receive veterans' disability benefits." 490 U.S. at 594-95. As the Petition explains (Pet. 33-37), and as the Government appears to acknowledge (CVSG Br. 9-10), the divorce court's order in this case is economically identical to an order awarding half of

Petitioner's disability benefits to Respondent, which is precisely what *Mansell* prohibits. The order is therefore preempted.

The Government points out that Petitioner began receiving disability benefits after the divorce, rather than before the divorce as in *Mansell*. But under the USFSPA, a veteran is entitled to keep all of his disability pay, regardless of when he becomes disabled. The Government offers no statutory argument on why *Mansell* would apply only to pre-divorce but not to post-divorce waivers.

The Government endorses the Arizona Supreme Court's reasoning that the divorce court did not explicitly require Petitioner to pay half of his disability benefits, but instead required him to pay an amount precisely equal to half of his disability benefits. CVSG Br. 10-11. Yet it ignores that this Court has rejected this precise distinction—even in family law cases. For instance, in *Wissner v. Wissner*, 338 U.S. 655 (1950), a service member named his parents as the beneficiaries of a life insurance policy. After he died, a state court concluded that the insurance benefits were community property, and ordered the parents to pay half of the benefits to the widow. *Id.* at 658. The Court held that the state court order was preempted, rejecting the precise reasoning the Government advances in this case: "Whether directed at the very money received from the Government or an equivalent amount, the judgment below nullifies the soldier's choice and frustrates the deliberate purpose of Congress. It cannot stand." *Id.* at 659.

More recently, in *Hillman v. Maretta*, 133 S. Ct. 1943 (2013), a federal statute mandated that a federal employee's life insurance proceeds be directed to his named beneficiary. *Id.* at 1947. A Virginia statute provided that if the employee's marital status had changed, but he did not update his beneficiary designation, the employee's surviving spouse could sue the named beneficiary for the proceeds. *Id.* This Court held that the state statute was preempted, reasoning that because Congress had directed that the named beneficiary receive the money, that money "cannot be allocated to another person by operation of state law." *Id.* at 1950, 1953.

In its amicus brief in *Hillman*, the Government argued as follows:

> That conflict [between state and federal law] is not eased by the fact that [the Virginia statute], rather than intercepting the payment of proceeds in the first place, creates a cause of action against the named beneficiary only after she has received the benefits and only 'for the amount' received. ... *Wissner* found preemption even though the question was whether a judgment could be entered against the designated beneficiary for the amount of benefits that had been (and would be) paid to her. 338 U.S. at 658. ... And *Ridgway* [*v. Ridgway*, 454 U.S. 46 (1981)] found preemption even though the question was whether a constructive trust could be imposed on insurance proceeds that had already been distributed. This Court has reached the same conclusion in a

> number of other cases involving federal rights ... Any other result would permit States readily to evade federal preemption principles.

Br. for the United States at 19-20, *Hillman v. Maretta*, No. 11-1221, 2013 WL 1326956 (2013) (internal citations omitted). The Government's position in *Hillman* was correct. If federal law prohibits a state court from awarding half of a veteran's disability benefits to his ex-spouse, then an order awarding an amount identical to half of a veteran's disability benefits is preempted as well.

CONCLUSION

The petition for writ of certiorari should be granted.

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Respectfully submitted,

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